(2)

No. 95-643

Supreme Court, U.S.
FILED
NOV 29 1995
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1995

JOHN B. WALPOLE, THEODORA W. WALPOLE, JOHN B. WALPOLE, JR. and WILLIAM E. WALPOLE, d/b/a SUNNY POINT FARMS,

Petitioners,

vs.

GREAT AMERICAN INSURANCE COMPANIES and AMERICAN NATIONAL FIRE INSURANCE COMPANY,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

RICHARD B. NESS
Counsel of Record
NORMA A. T. JETT
EARLY & NESS
Attorneys for Respondents
209 North Main Street
P.O. Box 909
Bamberg, South Carolina 29003
(803) 245-5178

BEST AVAILABLE COPY

7826
Lutz Appellate Services, Inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

37pp

QUESTIONS PRESENTED

Does the decision of the Fourth Circuit Court of Appeals present a special or important reason for granting certiorari in this case, where the court correctly apprehended and applied the laws governing federal crop insurance, estoppel, and preemption of state law causes of action, and the Petitioners' claims were contrary to the plain, unambiguous policy language?

PARTIES

Petitioners are individuals involved in, and doing business as, an unincorporated joint farming venture, Sunny Point Farms. Respondent, American National Fire Insurance Company, is an insurance company, and is the subsidiary of its parent company, Respondent, Great American Insurance Companies. Respondents are not publicly held corporations.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties	ii
Table of Contents	iii
Table of Citations	iv
Opinions Below	2
Statement of Jurisdiction	2
Constitutional Provisions, Statutes and Regulations Involved	2
Statement of the Case	3
Summary of the Argument	8
Reasons for Denying the Writ	9
I. The Court should not exercise its discretionary jurisdiction to grant the Writ of Certiorari, as the Petition does not satisfy the Court's criteria for granting review.	9
II. The decision of the Fourth Circuit Court of Appeals was consistent with the law of federal crop insurance and preemption.	11

Contents

Page

III. Peititoners' claims are contrary to the plain, unambiguous, language of the policy issued. 14

Conclusion 16

TABLE OF CITATIONS

Cases Cited:

A.W.G. Farms, Inc. v. FCIC, 757 F.2d 720 (8th Cir. 1985) 10, 11, 12

Brown v. Crop Hail Management, 813 F. Supp. 519 (S.D. Tex. 1993) 11

FCIC v. Merrill, 332 U.S. 380, 68 S. Ct. 1, 92 L. Ed. 2d 10 (1947) 9, 10, 11, 12, 13

Mann v. FCIC, 710 F.2d 144 (4th Cir. 1983), *cert. denied,* 465 U.S. 1005, 104 S. Ct. 997, 79 L. Ed. 2d 230 13

Office of Personnel Management v. Richmond, 496 U.S. 414, 110 S. Ct. 2465, 110 L. Ed. 2d 387 (1990) 13

Owen v. Crop Hail Management, Inc., 841 F. Supp. 297 (W.D. Missouri, 1994) 12

State of Kansas, ex rel. Todd v. United States, 995 F.2d 1505 (10th Cir. 1993) 11

Utah Power & Light Co. v. United States, 243 U.S. 389, 37 S. Ct. 387, 61 L. Ed. 791 (1917) 13

Contents

	Page
Statutes Cited:	
7 U.S.C. § 1501, *et seq.*	3
7 U.S.C. § 1502	2
7 U.S.C. § 1503	2
7 U.S.C. § 1506(k)	2, 12
7 U.S.C. § 1508(b)(3)	2, 4
7 U.S.C. § 1508(h)	2, 4
28 U.S.C. § 1254(1)	2
United States Constitution Cited:	
Article I, § 9, clause 7	2, 13
Rule Cited:	
Supreme Court Rule 10	9
Other Authorities Cited:	
7 C.F.R. § 400.351	2, 12
7 C.F.R. § 400.352	12
7 C.F.R. § 400.352(a)	2

Contents

	Page
7 C.F.R. § 400.401(b)	12
7 C.F.R. § 400.401(b)(2)	2
7 C.F.R. § 454.7(d)	4

APPENDIX

Appendix A — Relevant Constitutional Provisions, Statutes and Regulations 1a

No. 95-643

In The

Supreme Court of the United States

October Term, 1995

JOHN B. WALPOLE, THEODORA W. WALPOLE, JOHN B. WALPOLE, JR., AND WILLIAM E. WALPOLE, D/B/A SUNNY POINT FARMS,

Petitioners,

v.

GREAT AMERICAN INSURANCE COMPANIES AND AMERICAN NATIONAL FIRE INSURANCE COMPANY,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT:

The Respondents, Great American Insurance Companies and American National Fire Insurance Company, respectfully request that this Court deny the Petition for Writ of Certiorari submitted by Petitioners, John B. Walpole, Theodora W. Walpole, John B. Walpole, Jr., and William E. Walpole, d/b/a Sunny Point Farms.

OPINIONS BELOW

This action was brought in the District of South Carolina seeking a declaratory judgment of the proper amount of indemnity due Petitioners on a policy of crop insurance issued pursuant to the Federal Crop Insurance Act (FCIA). Initially, the Federal Crop Insurance Corporation (FCIC) was a defendant, along with Respondents. The district court dismissed the action as to FCIC.

After extensive discovery, Petitioners and Respondents moved for summary judgment. The district court ultimately granted Respondents' Motion, and Petitioners appealed. On May 25, 1995, the Fourth Circuit Court of Appeals affirmed the ruling of the district court. Petitioners' Petition for Rehearing and Suggestion for Rehearing En Banc was denied June 6, 1995.

STATEMENT OF JURISDICTION

The Supreme Court of the United States has jurisdiction to review the decisions of the Courts of Appeals pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

Article I, § 9, clause 7, United States Constitution.

7 United States Code §§ 1502, 1503, 1506(k), 1508(h), 1508(b)(3).

7 Code of Federal Regulations §§ 400.351, 400.352(a), 400.401(b)(2).

STATEMENT OF THE CASE

Petitioner John Walpole is a long-time tomato farmer in Charleston County, South Carolina. Prior to 1992, Petitioners (hereinafter "Walpoles") obtained crop insurance directly from FCIC. For the 1992 tomato season, the Walpoles purchased a reinsured production plan tomato policy from Respondents (hereinafter jointly referred to as "insurer") for the 1992 tomato crop. Early in the 1992 season, the Walpoles suffered crop damage which was adjusted without disagreement. Replanting benefits were paid by insurer.

Later during the season, on July 2, 1992, John Walpole called insurer's representatives and advised a storm had damaged the tomatoes. Insurer's adjusters went to the farm to view the tomato crop. While discussing the issues with the Walpoles, it became apparent John Walpole wanted the insurance policy interpreted contrary to the clear policy terms and FCIC regulations. As a result of the discussions between the parties, they called FCIC representative Charles Skinner regarding FCIC's position on the policy language and the required adjustment procedures. Skinner affirmed insurer's policy interpretation was correct and consistent with FCIC's interpretation. The disagreement and the substance of this action is entirely over the construction of the policy.

Insurer issued a multi-peril crop insurance policy insuring the Walpoles' tomato crop for loss from various causes. The policy was reinsured by FCIC, an entity of the federal government established by the Federal Crop Insurance Act, 7 U.S.C. § 1501, *et seq.* ("the Act" or "FCIA").

FCIC's rationale behind its program, policies, and regulations is to promote the national welfare by improving the economic stability of agriculture through a sound system of crop

insurance. Prior to the passage of the Act, private companies deemed crops too risky for participation. Since 1980, when Congress allowed FCIC to expand its program to cover all crops and counties, FCIC has largely relied on private insurance companies rather than directly issuing policies to farmers. The relationship of FCIC to the private insurers is governed by a reinsurance agreement between FCIC and the insurer, as well as statutory and regulatory requirements concerning issuance and adjustment of the policies.

The Act authorizes and governs two (2) types of crop insurance policies: policies directly issued by FCIC; and, policies issued by private insurance companies but reinsured by FCIC. Although their provisions are similar, the two (2) types of policies need not be, and are not, identical. FCIC's directly issued policies are printed verbatim in the Code of Federal Regulations. (FCIC is statutorily authorized to issue regulations governing crop insurance.) The Guaranteed Production Plan, Fresh Market Tomatoes, crop insurance policy is specifically codified as a regulation at 7 C.F.R. § 454.7(d), but the terms at issue in this action are those of the policy issued by Respondents.

The reinsured policies are only slightly differently worded, but provide the same coverage. FCIC must approve the policy language, and FCIC establishes its premiums, terms, and conditions. 7 U.S.C. § 1508(b)(3). FCIC subsidizes the farmer's premium and is required to pay operating and administrative costs of insurers for whom reinsurance is provided, to the extent those costs are covered by FCIC on its directly issued policies. 7 U.S.C. § 1508(h). All such policies include language explaining that FCIC has reinsured the policy and all terms, conditions, rights, and responsibilities thereto are subject to the Act and FCIC regulations.

The policy issued to the Walpoles consists of two parts: a

three-page "General Provisions" document; and, a four-page "Special Provisions, Fresh Market Tomatoes - Production Plan" document. The language central to this dispute appears in the Special Provisions at Page 2, Item 6(c) and 6(c)(2)(a). (*See* Petition, A.40) Item 6(c) provides as follows:

> The total production to be counted will be cartons from insurable acreage for the farm unit and will include all appraised and harvested production.

6(c)(2) provides as follows:

> Harvested Production will include:
>
> (a) all tomato production marketed; and
>
> (b) any harvested unmarketed production meeting the standards for grading 85 percent or better U.S. No. 1's with classification size of 6x7 (2-8/32 inch minimum diameter) or larger."

The discussions between the Walpoles and insurer's representatives centered around what would be "production to count." John Walpole asserted "production to count" would include only tomatoes which graded as U.S. No. 1. John Walpole was fully advised that the policy language quoted above required that all tomato production marketed would be considered as "production to count."

Prior to the policy's issue, the farmer's guaranty level must be established. In all cases, including this case, the farmer's total production history and yield in prior years must be considered in establishing the insurable guaranty level pursuant to FCIC

guidelines. There is no distinction between Grade 1, Grade 2, or Grade 3 tomatoes sold by the farmer. This benefits the farmer by allowing him to use all production from the prior years, regardless of grade, to establish his guaranty. Thus, the higher his prior production, the higher the guaranty level for the farmer in later years. Commensurately, when "production to count" is established during a loss calculation in a given year, all tomatoes which are marketed are likewise counted. No exception is made to omit lesser grade tomatoes from poor production years or to omit tomatoes harvested after the insurance period. In this case, Walpoles had the benefit of all prior production years in the setting of their guaranty. Theirs is a high guaranty due to their prior high production.

As the parties discussed these matters at Sunny Point Farms on July 2, 1992, the irrigation, fertilization, picking, packing, and selling of tomatoes continued. It is *significant* that no break or cessation of harvest or packing occurred. In the discussions between the parties, it is undisputed that John Walpole pressed the adjuster, marketing representative, and agent for advice on whether he should continue to harvest, pack, and market, or whether he should cease harvesting and declare his operation for 1992 ended. It was established below that neither the adjuster, Willie James Kelly, nor anyone else present, gave John Walpole any instructions or advice on what he should do, but only the insurance adjustment procedures which would follow his decision. The insurer's representatives are not farmers and cannot and should not give any advice on what farmers should do.

Petitioners were told the decision was solely theirs as businessmen, and, in the event they continued harvesting, then the insurer's representatives would return at the end of the harvest to determine the extent of loss. Petitoners were further made aware that, in the event they decided to cease the harvest, an appraisal would be conducted to determine "production to

count." Ultimately, Petitioners opted to harvest and market the crop. When market prices fell, the decision proved costly.

The central issue litigated below was whether the boxes of tomatoes which met the standard 85% or better U.S. Grade No. 1's would be the only "production to count," or whether the other 309,487 boxes which were harvested, boxed, and sold during this tomato season would also be included as "production to count." Walpoles asserted only U.S. Grade 1's (3200 boxes in this case) would count against the indemnity due under the policy. The policy language as set forth in 6(c)(2) of the Special Provisions provides all tomato production marketed will be included as "production to count." There is clearly no differentiation for any grade of tomato which is ultimately marketed. Therefore, pursuant to the plain and unambiguous language of the policy, all tomato production marketed (sold) will be counted and included in "production to count."

A second "issue" raised by Walpoles in this case is when the "policy period" ended.[1] For insurer, this is not an issue. The insurance period is set forth in the Special Provisions - Fresh Market Tomatoes - Production Plan, Item 1. (*See* Petition, A.39). Walpoles contend the policy period ended on July 2, 1992, when the storm damaged many tomato plants by breaking stakes and blowing over the plants. Walpoles *now* term this a total destruction. At no time prior to litigation did Walpoles contend the tomato crop was destroyed. It was not determined to be destroyed by insurer's representatives as is required by Paragraph 1(f) of the Special Provisions. (*See* Petition, A.39). Further, there was no (a) final adjustment of loss; or, (b) discontinuance of harvest. The insurance period ended when

---

1. Walpoles contend the farmer can pick and sell tomatoes after the insurance period ends, and keep the sale *and* insurance proceeds for the same tomatoes.

Walpoles completed their entire harvest and sales in late July. There was no destruction of the crop as stated by Petitioners.

Paragraph 1(f) of the Special Provisions provides that the insurer will determine if the tomato crop is destroyed. (*See* Petition, A.39). If that determination is made (*but* this crop was *not* deemed destroyed) a complete appraisal of tomatoes in the field would be required and conducted pursuant to Paragraph 6(c)(1) (Petition, A.41). All appraised production would be included as "production to count" and offset against any indemnity due. Walpoles' position disregards the Special Provisions, Section 6(c)(1)(d)(iii) (Petition, A.41-42), which provides if any tomatoes are harvested after the end of the insurance period, the appraisal is disregarded, and the sold tomatoes count as tomato production marketed.

In the district court, Walpoles characterized the harvesting of tomatoes after July 2 as a salvage operation. On appeal, they termed it a demonstration to document their loss. It is interesting to note in the Amended Complaint there was no discussion of "salvage."

The "production to count" was calculated in accordance with the terms of the policy requiring that all tomato production marketed be included as "production to count." The "production to count" is applied to guaranty level and it was determined Petitioners were entitled to $156,342.00, less the premium due ($47,743.00). It is undisputed a check has been issued to Walpoles in the amount of $108,599.00. Insurer contends no further indemnity is due or owing to Walpoles.

SUMMARY OF THE ARGUMENT

This case presents no issue appropriate for the Court's exercise of its discretionary jurisdiction. It presents no special or important reason for granting certiorari.

The decision of the Fourth Circuit Court of Appeals was consistent with the law of federal crop insurance and preemption, specifically *FCIC v. Merrill*, 332 U.S. 380, 68 S. Ct. 1, 92 L. Ed. 2d 10 (1947), and its progeny. Petitioners cannot use estoppel or state law claims to expand insurance coverage under FCIA beyond that established by the unambiguous policy.

REASONS FOR DENYING THE WRIT

The Petitioners do not satisfy the criteria applied by the Court in determining whether to grant a Writ of Certiorari. The decision of the Fourth Circuit Court of Appeals was consistent with the statutory (FCIA) and common law of this Court. Of particular relevance is *FCIC v. Merrill*, 332 U.S. 380, 68 S. Ct. 1, 92 L. Ed. 10 (1947), and the line of cases emanating from *Merrill*. The Court below properly held the plain and unambiguous language of the policy to be controlling as to the indemnity due thereunder. The Court further ruled correctly that state law causes of action could not be applied to provide indemnity or damages to petitioners beyond the coverage prescribed by the policy, which is governed by the FCIA.

I.

THE COURT SHOULD NOT EXERCISE ITS DISCRETIONARY JURISDICTION TO GRANT THE WRIT OF CERTIORARI, AS THE PETITION DOES NOT SATISFY THE COURT'S CRITERIA FOR GRANTING REVIEW.

"A review on writ of certiorari is not a matter of right, but of judicial discretion." Supreme Court Rule 10. The Petitioners have demonstrated no special or important reason for granting certiorari in this case, as required by Supreme Court Rule 10. The decision of the Fourth Circuit Court of Appeals does not meet any

of the reasons for review enumerated in Rule 10, nor does it present any other special or important reason.

The district court decision affirmed in the Court of Appeals correctly construed the unambiguous insurance policy at issue in this action. It analyzed the undisputed facts by applying the law of federal crop insurance, as set forth in *FCIC v. Merrill*, 332 U.S. 380, 68 S. Ct. 1, 92 L. Ed. 2d 10 (1947). Petitioners have cited no law from this Court or other circuits with which the opinion actually conflicts.

The Eighth Circuit case cited by Petitioners as conflicting, *A.W.G. Farms, Inc. v. FCIC*, 757 F. 2d 720 (8th Cir. 1985), is factually and legally distinguishable from this case, in that the *A.W.G. Farms* policy insured the *quality* of sugarbeets, while this policy insured only *quantity* of tomatoes. The harvesting and sale of the beets did not affect indemnity amounts, if the beets were of a deficient sugar content. Furthermore, Petitioners cite *A.W.G. Farms* to support their state law causes of action, but *A.W.G. Farms* does not address the preemption issue.

This Court's decision in *Merrill, supra*, disposes of the issues for which *A.W.G. Farms* is cited. Pursuant to *Merrill*, there can be no estoppel or state law causes of action based on statements or conduct of the adjusters. Statements or conduct regarding farming decisions cannot alter the clear and unambiguous terms of the policy governing production to count. Petitioners' only remedy was the coverage expressly provided by the policy. *Merrill, supra*. The Eighth Circuit Court of Appeal, by its decision in *A.W.G. Farms*, did not, and could not alter this Court's holding in *Merrill*. Petitioners' claims are disposed of by this Court's previous decision.

No special or important reason for granting certiorari having been shown, no review should be granted.

II.

THE DECISION OF THE FOURTH CIRCUIT COURT OF APPEALS WAS CONSISTENT WITH THE LAW OF FEDERAL CROP INSURANCE AND PREEMPTION.

Petitioners have requested this Court "determine the applicability of state and common law legal principles to cases arising under the Federal Crop Insurance Program, and to address the proper construction of federally-approved crop insurance policies under the Crop Insurance Act." (Petition for Writ of Certiorari, 6). This Court has already done so, in 1947, in *FCIC v. Merrill*, 332 U.S. 380, 68 S. Ct. 1, 92 L. Ed. 2d 10. In *Merrill*, this Court held the coverage provided by a federal crop insurance policy could not be expanded by the representations of the insurance company's agents and employees.

Petitioners' reliance on the *A.W.G. Farms* decision is misplaced. *A.W.G. Farms* does *not* create a conflict among circuits as to preemption. Preemption was not raised nor addressed as an issue in *A.W.G. Farms*. Perhaps if it had been, the resulting decision would have been different. The only lower court decisions on the issue of preemption have been in favor of preemption. In *State of Kansas, ex rel. Todd v. United States*, 995 F.2d 1505 (10th Cir. 1993), the Tenth Circuit Court of Appeals affirmed a district court ruling that state law causes of action are preempted by the FCIA and the regulations authorized by it. A similar ruling was reached in *Brown v. Crop Hail Management*, 813 F. Supp. 519 (S.D.Tex. 1993). There is no conflict among the circuits as to preemption, not even by reliance on *A.W.G. Farms*.

During the course of this action in the district court, Petitioners amended their Complaint to add several theories of recovery and state common law causes of action (breach of

contract, restitution, unjust enrichment, negligent misrepresentation, reformation, estoppel) not provided in the Federal Crop Insurance Act (FCIA).

7 U.S.C. § 1506(k) provides state laws are not applicable to Federal Crop Insurance Corporation (FCIC) contracts. FCIC regulations, 7 C.F.R. § 400.351 and § 400.352, preempt state law causes of action as to policies issued or reinsured by FCIC. 7 C.F.R. § 400.352 provides states have no authority "to promulgate rules or regulations, pass laws or issue policies *or decisions* that directly or indirectly affect or govern agreements, contracts or actions authorized by" the Federal Crop Insurance Corporation regulations. (emphasis added) 7 C.F.R. § 400.351 provides the regulations of the Federal Crop Insurance Corporation govern all policies of insurance insured or reinsured by FCIC, and contracts, agreements, or actions authorized by the FCIA and entered into or issued by FCIC. Also see 7 C.F.R. § 400.401(b). The preemptive regulations were adopted by FCIC after its program expanded to include reinsuring policies written by private companies. *Owen v. Crop Hail Management, Inc.*, 841 F. Supp. 297 (W.D. Missouri, 1994) (setting forth the history of FCIC reinsurance).

Even if this Court determines *A.W.G. Farms* applies, Petitioners cannot demonstrate bad faith on the part of Respondents' employees. Petitioners claim they were harmed by selling their crop and losing insurance proceeds. However, had they foregone harvest, the production abandoned in the field, including those adequately sized tomatoes which at the packing shed would have been culls, would be counted against them under the unharvested production provisions of the policy. This unambiguous provision prevents the insurance from creating a disincentive to harvest and mitigate losses.

This Court held in *Merrill*, *supra*, that estoppel cannot be

used to expand coverage beyond that provided by the policy and statutes. Under *Merrill*, all crop insurance regulations are binding on all who come within the provisions of FCIA. Absolute compliance with policy provisions, statutes, and regulations is required in actions involving federal crop insurance policies, whether directly issued by FCIC or reinsured by FCIC. *Merrill, supra*; *Mann v. FCIC*, 710 F. 2d 144 (4th Cir. 1983), *cert. denied*, 465 U.S. 1005, 104 S. Ct. 997, 79 L. Ed. 2d 230. This Court held the insured was not entitled to rely on statements by the insurer's employees which were contrary to policy provisions.

Regardless of whether a crop insurance policy is issued directly by FCIC or reinsured by FCIC, all indemnity payable under the policy will ultimately have one source — the federal treasury. It should be of no consequence that the policy is issued by a private insurer. This Court, in *Utah Power & Light Co. v. United States*, 243 U.S. 389, 37 S.Ct. 387, 61 L. Ed. 791 (1917), held the federal treasury would not be liable, even on the basis of misrepresentations of its agents, to do what was not authorized by law. Only the indemnity available under the FCIC-approved policy issued to Petitioners and authorized by statute can be awarded. *Office of Personnel Management v. Richmond*, 496 U.S. 414, 110 S.Ct. 2465, 110 L. Ed. 2d 387 (1990) (award of funds from federal treasury on estoppel theory would violate Appropriations Clause of United States Constitution, as an expenditure without authorization of Congress).

To reverse the decision of the Fourth Circuit Court of Appeals, this Court would be required to disregard the Federal Crop Insurance Act, ignore the Appropriations Clause of the United States Constitution, and abandon its prior holdings in *Merrill* and *Richmond*. The ruling of the Fourth Circuit was consistent with all of those, and the writ of certiorari should be denied.

III.

PETITIONERS' CLAIMS ARE CONTRARY TO THE PLAIN, UNAMBIGUOUS, LANGUAGE OF THE POLICY ISSUED.

Petitioners have made claims in this matter which are contrary to the plain, unambiguous, language of the insurance policy at issue. The policy issued was a production plan policy, meaning it insured petitioners would produce a given number of boxes of tomatoes (based on prior yields). The number of boxes deemed produced in the insured year is subtracted from the guaranteed yield, and the insured is paid for the deficiency, if any, at a price per box elected by him when the coverage is purchased.[2]

The formula for paying indemnity in an FCIC-reinsured policy is derived from the FCIC-approved policy. A farmer's prior yield over a number of years is used to calculate a guaranty level — what he should be able to produce each year. The farmer's indemnity is figured by multiplying the guaranty by the number of insured acres, then subtracting "production to count" (in numbers of boxes).

Pursuant to the policy, production is determined by counting unharvested[3] and harvested production. Harvested production includes marketed production, regardless of grade. Harvested production also includes picked, but unmarketed, tomatoes which would meet a standard of 85% or better U.S. No. 1 per box. (*See* Policy, Item 6c(2)(b), Petition, A.42.)

---

2. Petitioners, on page 9, erroneously discuss the "costs of growing." The insurance does not pay the insured the actual cost of growing. It pays an elective price per box for the shortfall.

3. Unharvested production is not an issue in this case.

The chief issue in this case was whether the tomatoes sold by petitioners (but not meeting the standard 85% or better U.S. No. 1) must be counted. Clearly, the policy provides they must. The district court held all tomatoes sold by petitioners must count, and that there was nothing ambiguous about the policy. While petitioners were not paid indemnity for those boxes, they did receive sale proceeds for those tomatoes, which were sold at prevailing market prices, albeit in a depressed market.

The FCIA does not mandate a "perfect" crop insurance program. Certain losses will be uncompensated by insurance proceeds. Federal crop insurance is remedial legislation not intended to help a farmer make his usual profit. It is intended to compensate for disastrous losses, to an extent which prevents total loss of invested costs. That there are circumstances in which a farmer might have an uncompensated loss does not render the policy ambiguous. That two parties might disagree on its meaning and require a court's interpretation likewise does not render it ambiguous.

The policy is clear: "Harvested production will include . . . all tomato production marketed; . . .". It could not be stated more clearly. All tomatoes sold by petitioners must be offset against the indemnity. The district court and the Court of Appeals found the language clear. The result is that petitioners receive sale proceeds for sold tomatoes and insurance proceeds for their shortfall in quantity, not sale proceeds plus insurance indemnity on the same tomatoes, as they seek.

CONCLUSION

As set forth above, this case presents no special or important reason for this Court's review. It presents no novel issues or inter-circuit conflicts requiring resolution. The case has been decided in a manner consistent with this Court's prior decisions and sound policy construction. The Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

RICHARD B. NESS
Counsel of Record
NORMA A. T. JETT
EARLY & NESS
Attorneys for Respondents
Post Office Box 909
Bamberg, SC 29003
(803)245-5178

APPENDIX A — RELEVANT CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

CONSTITUTIONAL PROVISIONS INVOLVED

"No money shall be drawn from the treasury, but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time." Article I, §9, clause 7, United States Constitution.

STATUTORY PROVISIONS INVOLVED

7 U.S.C. § 1502: "Declaration of purpose. It is the purpose of this title to promote the national welfare by improving the economic stability of agriculture through a sound system of crop insurance and providing the means for the research and experience helpful in devising and establishing such insurance."

7 U.S.C. § 1503: "Federal Crop Insurance Corporation; creation; offices. To carry out the purposes of this title, there is hereby created as an agency of and within the Department of Agriculture a body corporate with the name "Federal Crop Insurance Corporation" (herein called the Corporation). The principal office of the Corporation shall be located in the District of Columbia, but there may be established agencies or branch offices elsewhere in the United States under rules and regulations prescribed by the Board of Directors."

7 U.S.C. § 1506(k): "Contracts. The Corporation may enter into and carry out contracts or agreements necessary in the conduct of its business, as determined by the Board. State and local laws or rules shall not apply to contracts or agreements of the Corporation or the parties thereto to the extent that such contracts or agreements provide that such laws or rules shall not

apply, or to the extent that such laws or rules are inconsistent with such contracts or agreements."

7 U.S.C. § 1508(b)(3): "Review and approval by the Board. A policy or other material submitted to the Board under this subsection shall be reviewed by the Board and, if the Board finds that the interests of producers are adequately protected and that any premiums charged to such producers are actuarially appropriate, shall be approved by the Board for reinsurance and for sale to producers as an additional choice at actuarially appropriate rates and under appropriate terms and conditions taking into consideration the risks covered by the policy or other material. The Corporation may enter into more than one reinsurance agreement simultaneously to facilitate the offering of such new policies. Proposals made to the Board under this paragraph shall be considered as confidential commercial or financial information for purposes of section 552(b)(4) of title V, United States Code until approved or disapproved by the Board. The Board shall provide an applicant with notification of intent to disapprove a proposal not later than 30 days prior to taking such action. An applicant so notified may modify such application and such modification shall be considered an extension of the original application."

7 U.S.C. § 1508(h): "Reinsurance. The Corporation is directed, notwithstanding any other provision of this title, to provide reinsurance, to the maximum extent practicable, upon such terms and conditions as the Board may determine to be consistent with subsections (a) and (b) of this section and sound reinsurance principles, to insurers including private insurance companies or pools of such companies, reinsurers of such companies, or State or local governmental entities, including any political subdivisions thereof, that insure producers of any

agricultural commodity under a plan or plans acceptable to the Corporation. A test program of such reinsurance shall be made available, to the maximum extent possible, to begin not later than with the 1982 crops. In order to provide equity among producers purchasing crop insurance, whenever the Corporation provides reinsurance under this subsection to any such insurers, the Corporation shall pay a portion of each producer's premium for such insurance so reinsured. Each such payment shall cover the same per centum of the premium, and be subject to the same restrictions regarding payments of premiums for crop insurance on commodities, as provided in subsection (b) of this section for Federal partial payments of Federal crop insurance premiums. The Corporation shall also pay operating and administrative costs to insurers of policies on which the Corporation provides reinsurance to the same extent that such costs are covered by the Corporation on the Corporation's policies of insurance. Insurers of policies on which reinsurance is provided shall make use of licensed private insurance agents and brokers on the same basis as provided for policies of the Corporation under section 507(c)(3) of this title, except that the provisions for compensating agents and brokers from premiums paid by the insured shall not apply. Beginning with the 1992 reinsurance year (July 1, 1991, through June 30, 1992), the Corporation shall revise its reinsurance agreements with the reinsured companies so as to require the reinsured companies to bear an increased share of any potential loss under such agreement, taking into consideration the financial conditions of the reinsured companies and the availability of private reinsurance.

REGULATIONS INVOLVED

7 C.F.R. § 400.351: "Basis and applicability. The regulations contained in this subpart are issued pursuant to the

Appendix A

Federal Crop Insurance Act, as amended (7 U.S.C. 1501 et seq.) (the Act), to prescribe the procedures for federal preemption of State laws and regulations not consistent with the purpose, intent, or authority of the Act. These regulations are applicable to all policies of insurance, insured or reinsured by the Corporation, contracts, agreements, or actions authorized by the Act and entered into or issued by FCIC."

7 C.F.R. § 400.352(a): "State and local laws and regulations preempted. No State or local governmental body or non-governmental body shall have the authority to promulgate rules or regulations, pass laws, or issue policies or decisions that directly or indirectly affect or govern agreements, contracts, or actions authorized by this part unless such authority is specifically authorized by this part or by the Corporation."

7 C.F.R. § 400.401(b)(2): "These regulations are applicable to: (2) All holders of crop insurance policies sold by private insurance companies and reinsured by the FCIC under the provisions of an FCIC Standard Reinsurance Agreement or other FCIC reinsurance agreement; and all private reinsured companies, their contractors and subcontractors, including past and present officers and employees of such companies, their contractors and subcontractors."